

## **ECSA 1993: Police Cooperation, Community Governance and Regulatory Regimes**

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Paper for the European Community Studies Association Conference, 27-29 May 1993, Washington D.C.

This paper has been written as part of a research project on "A System of European Police Co-operation after 1992", which is principally funded by the Economic and Social Research Council.

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## 1. Cross-border police co-operation in the European Community

International police co-operation is not an entirely new policy issue in Europe, as it has been preceded by various initiatives across the field. The best-known initiative is probably Interpol, which is a "global" or supranational International Criminal Police Organisation with legal statutes that "do not correspond to contemporary realities" (Anderson 1989: 60). Interpol's principal remit is the facilitation of the international exchange of criminal information. It acts as a "letterbox" or "service-hatch" for requests that are codified, translated and then sent to relevant destinations across the world. During the last decade, Interpol has been subject of criticism, for three reasons in particular: 1) Interpol is a non-operational police organisation, and can therefore neither independently perform criminal investigations nor actively enforce the law; 2) Membership of Interpol is accessible for all recognised states in the world, and the mixture of political regimes (Libya and Britain are both members for instance) resulting from that complicates action in pursuit of anti-terrorist objectives (Anderson 1989: 146); 3). The global nature of Interpol has also meant that, despite the creation of regional secretariats, a targeted, regional approach to crime is exceedingly difficult.

Frustrated with the lethargy arising from Interpol's shortcomings, the European Council of Ministers created Trevi in 1975. This fairly loose, intergovernmental structure for EC Ministers of Justice and Home Affairs focused on the occurrence of terrorism and extremism in Europe. Trevi distinguishes itself from Interpol in a number of important ways: 1) Although Trevi is intergovernmental and as such not embedded within the institutional structure of the European Community, it is tied up with the process of European institutionalisation which is entailed by the progress of European integration. Trevi is therefore a purely regional organisation, marked by the membership and boundaries of the European Community itself. 2). Trevi is a political body, almost in the sense that it acts as the European "think-tank" about EC internal security issues. It brings forward proposals, which may or may not be realised on other intergovernmental levels. 3). Trevi's substantive remit reaches beyond that of criminal law enforcement. The initial departure of the organisation was its concern about terrorism, but its remit has gradually been expanded (Cf. Den Boer & Walker 1993: 6) and now also includes matters such as police training and immigration. Trevi now has a three-tier structure, which includes a ministerial level, a senior official level and a system of working groups which comprises civil servants and police officers.

Until recently Trevi consisted of four working groups, namely I, II, III and Trevi '92. The latter has now been abolished due to the completion of the Internal Market: it was responsible for the monitoring of the measures which had been announced in the 1990 *Dublin Programme of Action* (concerning the exchange of liaison officers, the control over internal and external frontiers, the development of a European Information System and new communication methods, training exchanges and technical and scientific support; cf. Anderson 1992). Trevi III has adopted the remaining activities from Trevi '92, and has two sub-working

groups, which are the EDIU and the Europol working group (they run parallel). The Europol Working Group prepares the policy-ground for the establishment of Europol, whereas a team in Strasbourg prepares the practical and operational ground. As the establishment of Europol is more strongly related to the Maastricht Treaty, we will return to it later in the paper. Another important pillar of Trevi III is the Ad Hoc Group on Organised Crime, which was created in September 1992 to encourage co-operation and joint action in the fight against the increasing influence of the mafia and other organised criminal groups; this group reports directly to the Council of Ministers.

One of the questions in this paper is how Trevi is evolving from an *ad hoc* working structure to a more firmly embedded institutional structure. As there is a future possibility that parts of Trevi's remit will be absorbed by the European Community (Den Boer & Walker 1993: 7), we should spend some attention to how this evolution is related to the wider process of European integration, which can be regarded as one of the driving forces behind the insertion of justice and home affairs into the realm of European Community policy-making and legislation. If the ratification-process of the Maastricht Treaty will be successfully completed, Trevi will eventually be dissolved and be integrated in the wider "Co-ordinating Committee", which will also absorb other intergovernmental structures (Article K.4, *Treaty on European Union*).

Apart from a number of bilateral and multilateral agreements which contain issues relating to cross-border policing (Benelux Agreement 1962; Saarbrücken Agreement 1984; Anglo-Irish Agreement 1985; Schengen Accords 1985, 1990), there is a wide spectre of co-operative structures, which are mostly based on intergovernmental statutes<sup>1</sup>. A number of these groups are of major significance to the policy-making in the area of justice and home affairs. The **Pompidou Group** was created in 1971 as a Council of Europe body to examine problems and measures to combat drug trafficking within the Member States of the European Community. **CELAD**, or the Comité de la Lutte Anti-Drogue, was created in 1989 by the European Council, and is responsible for looking at anti-drug trafficking measures in the light of the abolition of border controls. The **Group of Co-ordinators**, which was set up by the European Council of Ministers in 1988, has been instrumental in co-ordinating and partly monitoring the activities concerning the lifting of internal border controls; its strategy document, called the *Palma Document*, contains an inventory of all obstacles to the removal of border controls and a timetable. The **Ad Hoc Group on Immigration** has been extremely important in that it has drafted agreements such as the *Dublin Convention on Asylum* (June 1990) and the *External Borders Convention* (still in draft stage); it was set up in 1986 and was composed of the Ministers of Interior of the EC Member States, and has a permanent secretariat which is attached to the Council of Ministers. The only structure which is institutionally integrated in the European Commission, is the **UCLAF**, which is the Unité de la Co-ordination de la Lutte Anti-Fraude, and created in 1989; it specifically monitors EC fraud. The differences between these structures are striking: they are different in terms of their **crime area** (drugs, terrorism, fraud, etc.), their **territorial remit** (EC, Council of Europe, UN, etc.), and the **quality and intensity**

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<sup>1</sup>For an elaborate overview, see De Zwaan 1993.

of the co-operation they pursue (co-ordination and development of legal capacities, policy-making, common operations, operational support) (Den Boer & Walker 1993: 4).

The commonality between these initiatives is their predominantly **intergovernmental character**:

"In view of the evident reticence of Member States to accept the Community approach in the sensitive area of immigration controls, asylum, visa, drugs control, crime prevention and the like, the Commission provisionally accepted the Member States' preference to follow the intergovernmental approach in order to avoid time-consuming and unprofitable debates on competences (..)" (Timmermans 1993: 352).

These are respectively to be distinguished as a set of **governance institutions** and a set of **governance instruments** (Bulmer 1993). "Governance institutions" are Interpol, Trevi, the Ad Hoc Group on Immigration, the Pompidou Group, UCLAF, UCLAT, MAG'92, and Europol, whereas "governance instruments include the conventions mentioned above, EC-regulations (in particular EC directives), jurisprudence of the European Court of Justice, "soft" law and political agreements (we will return to these distinctions below). The intergovernmental character of these agreements has at least two dimensions: 1). There is a general acknowledgement that international co-operation in the fields of justice and home affairs is a necessity in order to deal with the wider effects of European integration. These effects are thought to include the increase in international crime and (illegal) immigration due to the completion of the Single Market, which has entailed the free movement of persons through the abolition of systematic passport checks at the internal borders of the European Community (Article 8A *Single European Act*). The acknowledgement is therefore inspired not by long-term strategic policy considerations, but by short-term crises such as the flow of refugees and the massive drug problem in the European Community. We will return to the role of the crisis-concept in international relations under paragraph 2.2 below; 2). There is a general resistance to subject problems related to law enforcement to European Community policy. The objection to the transfer of "sovereignty" (which we will below) will be raised by different advocates in the policy community. Police officers will want to pursue international professional solidarity and a common interest in successful law enforcement, without wanting to have their professional drive explicitly debated, acknowledged or refuted by politicians. Civil servants will want to balance the interests of national politics with those of international politics, and may see the transfer of sovereignty as a way of being forced to make (unwanted) concessions in their national camp. Politicians may want to take account of the wishes of the electorate (note that the newly elected government in France has shifted its politics from a willingness to integrate to a closure from international compromises, in view of the seriousness of the problems relating to drugs and illegal immigration). 3) The intergovernmental nature of governance institutions and instruments may signal a half-way house strategy, from which it is convenient to withdraw if in doubt, and flexible to

reinforce when desired. Intergovernmental institutions are therefore very much the outcome of integrationist objectives without a long-term political commitment. The "half-way house" strategy makes it possible to prepare the ground for a range of policy-issues, without concern for judicial and democratic institutionalisation, integration, or accountability. This makes the intergovernmental arena of policy-making, and in particular - as we have seen - in the field of European police co-operation, a "grey" or diffuse one, in which it is difficult to distinguish the exact demarcations of interests, influences, tasks and powerful agents.

## 2. Police, the State and the Transfer of Competence

It is unsurprising that the area of international police co-operation is still a largely intergovernmental enterprise. Policing is traditionally an extension of the nation-state (Walker 1992; Den Boer & Walker 1993: 11), and is as such subject of national sovereignty, which limits the potential for a transfer of aspects of European police co-operation to the realm of European Community competence. However, as we see the emergence of a so-called "European **internal security continuum**", policing issues are increasingly tied up with matters which are subject of European Community competence, such as citizenship and immigration (Bulmer 1993: 2). The potential transfer of state sovereignty over policing matters is also entailed by a more flexible interpretation of articles 8A and 100 of the *Single European Act*, which state that the free movement of persons in Europe is a necessary condition for European integration. But if, on the basis of this wider interpretation, European policing will develop progressively, then how can one perceive European policing without a state? Below, we shall look at these questions under three separate headings.

### 2.1 Sovereignty and EC competencies

The semantic transformation of the Europol-concept is indicative for the conceptualisation of the relation between international policing and the European Community as a federal type of state. Initially, in the debate about Europol, there was a comparison between the American FBI and a European police: Chancellor Kohl called for a European FBI, but the wording changed almost at the same time as the F-word was scrapped from the Maastricht Treaty (Den Boer 1992a: 8).<sup>2</sup> It was obvious from the lack of consensus between the EC Member States that the time was not yet ripe for a definition of the European Community as a semi-state or as a highly institutionalised supranational structure with the identity of a state.

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<sup>2</sup>See e.g. *Financial Times* 25/9/91: "Accord unlikely on Dutch political union plan": "The Dutch have attempted a compromise by giving the Commission a role in immigration and asylum, but keeping police/judicial co-operation as something the member states should decide among themselves."; *Guardian* 11/11/91: "Treaty too federalist, says Major": "[The Dutch text] is said to address some of Britain's complaints over proposals for pan-European policing of joint immigration and asylum policies. Britain is content that these are put more closely in the context of European co-operation, rather than under the remit of the European Commission."; *Guardian* 12/11/91: "Dutch refuse to delete the F-word"; *Guardian* 3/12/91, David Marquand, "Fudge manufacturers of Maastricht".

As we noted above however, the intergovernmental character of the arrangements suggests a degree of optionality vis-à-vis integration of intergovernmental provisions into the EC-core of the Treaty on European Union. Timmermans (1993: 353) claims that the European Council has set the door ajar for a more communitarian approach when it accepted Chancellor Kohl's proposal for a European police at the Luxembourg summit in June 1991. In any case, the competence of the European Community in the enforcement of the free movement of people is based within Article 100 EEC: "In Community law Member States are not free to opt between an intergovernmental or a Community approach. This does not exclude transnational regimes negotiated between a limited number of Member States, like the Schengen Agreement provided that Community law is duly respected." (id: 367). Also from other issues it can be derived that the lack of competence of the EC in matters of immigration, asylum, drugs control, arms control etc. is not as clear-cut as is often argued. First of all, says Timmermans (id: 359), these issues are already not entirely free of Community interference. A good example is the recent creation of a Drugs Monitoring Centre under the wing of the European Community and the social policy concerns for immigration and drugs. As we will see below, EC legislation exists in the areas of money laundering, insider dealing and arms control. A "very old example" mentioned by Timmermans can be found in the Directive 64/221/EEC harmonizing national laws and policies on handling the public policies exceptions under Articles 48(3), 56 (and 66) EEC. Furthermore, it is argued that no sector of national law is by its very nature free from or protected against interference by Community law (Timmermans 1993: 359), and that even criminal law is "not safe from Community intrusion as the case-law of the Court clearly demonstrates"(see under 3.2 below). Schutte (1993: 94) argues:

"The general consensus as to strict separation (between Community law and criminal law; mdb) is wearing thin, particularly as a result of developments stimulated by the Community institutions themselves, in particular the Court of Justice and the Commission. One of these developments concerns the matter of attributing sanctioning powers to the Community itself, not *vis-à-vis* the Member States but *vis-à-vis* individual persons and organizations and the second development is the matter of imposing the obligation on Member States to introduce and apply punitive sanctions. Moreover, the Community has acquired and continues to acquire controlling powers over the law enforcement efforts including powers effected through the use of criminal procedures of the Member States."

There are a number of trends which point in the direction of an increasing influence of the Community over matters which are related to policing (Den Boer & Walker 1993: 18f). First, there are new forms of regulation which will require their own **sanctioning system** in order to enforce Community-wide norms. A development is already noticeable in the growth of the capacity of the EC in the domain of "administrative policing" (Van Reenen 1989: 47; Johnston 1992), in particular with regard to the enforcement of competition law (Lavoie 1992) and in the work of UCLAF, which co-ordinates efforts to combat EC fraud (Reinke 1992). In the case of fraud,

"Commission officials are being vested with greater operational powers, even though these may be exercised as yet only jointly with national authorities. The Commission seems, however, to be interested in performing such control functions independently and, in doing so, to exercise the right to enter premises, to inspect administrative records, to take samples and conduct interviews, and otherwise to gather evidence. As long as the right to bring the prerogative the member states (with the exception of anticompetition law), one may wonder for what purposes the Commission should be vested with all these powers." (Schutte 1991: 68)

In the future other responsibilities may be inserted in the realm of "administrative policing", specifically where it concerns environmental protection, health, nuclear safety and illegal immigration (Van Reenen 1989: 48). Second, the increasing institutional profile of the EC may provoke public order protests with a genuine European character (Van Reenen 1989: 46); one could imagine EC-wide anti-immigrant protests and counter-protests, industrial protests, anti-nuclear campaigns, and co-ordinated agitation against common policies (e.g. against CAP). Third, there may be a development of an external coercive potential, which may involve the Community in antagonistic relationships with hostile powers, when the internal security of the Community is at stake in acts of terrorism and espionage; this may force the EC Member States to undertake concerted action in the sphere of counter-intelligence. Fourth and finally, the increasing European integration may encourage and accelerate a general process of the internationalisation of traditional forms of national crime.

Meanwhile also, a striking example of an intergovernmental regime with the potential to become integral part of the European Community is the **Schengen Agreement**. The first Schengen Convention was concluded in 1985 between the Benelux countries, France and Germany, and was primarily set up as an economic agreement which would facilitate the free movement of goods. In the second **Implementation Agreement**, which was signed in 1990 after a string of delays caused by political controversy, the emphasis had noticeably shifted to the free movement of people between the Schengen-states, and to compensatory measures for the abolition of border controls between these states. The Implementation Agreement has not yet been ratified by all five "core"-states, which means that the operationalisation, i.e. the usage of the Schengen Information System, cross-border policing activities, etc., have been suspended. In the meantime however, the agreements concerning asylum, immigration, drugs, terrorism, fraud, money laundering and policing concluded within the wider intergovernmental framework of the EC Member States have expanded to such an extent, that their implementation may well run parallel to the implementation of Schengen. In particular the Dublin Asylum Convention, the External Borders Convention and the Justice and Home Affairs pillar in the Maastricht Treaty cover for a large part the same ground as the Schengen Implementation Convention. It is significant in this context that only EC

Member States can become a member of the Schengen Agreement,<sup>3</sup> and that the provisions of the Convention shall apply only in so far as they are compatible with Community law (Article 134, Schengen Convention of 19 June 1990). Hence, we may consider this regional agreement as transitional:

"The Schengen Convention which is expressly presented as an interim arrangement pending a final regime at the Community level (...) and which is expressed to be subject to Community law as the superior rule of law (Art. 134), therefore seems fully in conformity with Community law." (Timmermans 1993: 362)

A complication arises, Timmermans (id: 363) continues to say, when all Member States agree "on the necessity of a common regime for the twelve but *disagree* on the existence or the extent of Community powers to enact such as regime." The advantages of Community instruments over (intergovernmental) treaties are threefold: 1). enacting rules by Community instrument may be more expeditious, because independent approval by the national parliaments is not required (id: 364); 2). the establishment of a uniform interpretation in that divergent national laws can be overcome (id: 365); 3) better guarantees for transparency and legal security (id: 366).

## 2.2 The Internal Security Continuum

Calls for new initiatives in the field of justice and home affairs are often preceded and/or accompanied by justificatory arguments which seek to persuade relevant audiences of the need for pursuing new policy-objectives (i.e. Majone 1989; Den Boerb 1992). One of the arguments frequently raised is the growth of transnational crime. This trend has been pointed out by senior police officers for a number of years, but has been related specifically to the abolition of border controls. For a number of reasons, the justificatory arguments should not be taken at face-value, and should be substantiated and analysed before the undertaking of any actions.

As we already noted in chapter 1, the pursuance of new policies in the area of European police co-operation is very strongly based on the concept of "crisis", or the potential for instability, which is increasingly being fed through the international system (i.e. Williams 1992: 95). It should first of all be recognised that the concept of a European internal security is currently undergoing a number of conceptual and strategic transformations due to the change in the world order which is in turn caused by the shift from a bipolar to a multipolar system, and more in particular by the crumbling of the Berlin Wall and the concatenation of democratisation initiatives in Eastern and Middle Europe resulting from that. Two transformations are particularly significant. The first transformation entails the substitution of the "enemy", or the potentially destabilising factor. In this respect, West European governments have called off the Cold War, but have replaced this concept with large-scale immigration from Eastern and Southern regions. We could call this transformation a **substantive**

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<sup>3</sup>There are now nine members. All EC Member States apart from the UK, Ireland and Denmark are members.



**transformation:** the attention of internal security efforts has moved from communism to immigration. The second transformation is caused by a large demilitarisation process which has been started as a result of the end of the Cold War. However, the decrease in military troops in the East has effectively run parallel with a call for a more intensive involvement of police forces in the execution of internal controls and controls at the external borders. Although police forces will not be taking over military tasks, they will be employed to protect "soft" security objects throughout Europe. Apart from the growing involvement of police forces in the international exchange of "hard" intelligence, they are also likely to become an integral part of a future European coast guard for example. One may label this latter transformation as a **strategic transformation**.

Another dimension which is crucial to Europe's crisis-thinking is related to concerns about social welfare and health. Wide-spread drug addiction and concentrations in larger cities has been responded with fear for the spread of AIDS and other diseases, while more in general, drug addiction and crime raise concerns about the costs to be paid by individuals and society.

From the above we may infer that the creation of new initiatives in the field of European police co-operation is strongly linked with an international political discourse about (internal) security issues. The discourse, which is generally regenerated by the media, focuses on substantive arguments which support the expansion and intensification of cross-border policing. To a certain extent these arguments have become "self-supportive", in the sense that they have become standardised and crystalised, and are generally re-iterated in various debates concerning police co-operation, albeit in slightly modified versions. One of the very noticeable trends in this discursive formation is that issues related to international criminal justice have become strongly intertwined with issues related to the movement of people, i.e. immigration and asylum issues. In other words, concerns about international crime and about immigration have become part of the same discursive continuum, which Bigo and Leveau (1992) have been and is being achieved by means of a number of strategies. First of all, there is the strategy of interrelating the two subjects in relation to the same argument. For example, the cautious attitude expressed by politicians in some Member States about the abolition of internal border controls is often related to the fear for an increase in international drug trafficking, terrorism, fraud and illegal immigration<sup>4</sup>. The latter implies the second strategy, which is the growing criminalisation of immigrants and asylum seekers (Den Boer 1993). During the last few years the assumption that most asylum seekers knock on the doors of EC Member States because of economic reasons rather than political-religious reasons has become popularised to the extent that it is now a common good to

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<sup>4</sup>Dutch MEP Mathilde van den Brink said the following about the issue: "It is noticeable that in discussions there is constant talk about asylum-seekers, illegals and criminals in an order which is absolutely objectionable and it is really a dangerous tendency to use it that way because not every asylum-seeker is a refugee, not every immigrant is illegal and not all illegals are criminals and disturb the public order and security. It is therefore good to formulate clearly the concepts we are going to use." (translation mdb). In: Verbatim Report of the Proceedings, European Parliament, Monday II-Tuesday, Strasbourg, 16/11/92-17/11/92: 84.

speak of the so-called "bogus" asylum-seeker. Meanwhile, "illegal immigration", i.e. entering European countries without valid identity documents or permission, stands in the centre of political attention. Yet, the massive scale on which illegal immigration allegedly takes place has not been clearly substantiated by statistical evidence. Another level at which immigrants are subject of a creeping criminalisation-process, is the "clamp-down" on immigrants illegally resident or employed in the EC Member States, and the consolidation of the perception that immigrants are more often involved in crime than "native citizens". The third and final strategy is implied in the incrementalisation of institutional tasks and functions. Most significant in this respect is Trevi, which has expanded its initial remit from anti-terrorist measures to police training, immigration, and the wider issues related to the free movement of persons in the European Community.

### 2.3 The Interpretation of the Free Movement of Persons

Interpretations of legal notions are always relative to the context in which they appear. First of all, Timmermans (1993: 354) notes, "the notion of border controls" ought to be defined:

"The definition of the Schengen Convention seems to me quite adequate: control at the frontier which, irrespective of any other motive, is carried out only because of the envisaged border crossing. So defined, normal police controls they may occur everywhere within the national territory under the conditions imposed by national law, fall outside the scope of border controls, even where they are carried out in a border region (...). It could be argued that the very concept of the common market, as interpreted by the Court before the introduction by the SEA of Article 8A with its definition of the internal market, requires the abolition of internal border controls."

The author concludes that not only is the maintenance of some form of border control (e.g. the *Bangemann wave*) incompatible with the obligation under Article 8A EEC, also continuing border controls only with regard to nationals from third countries is incompatible with this obligation (id: 367). Border controls can only be allowed when they amount to **identity controls**, which "have to be put to a strict test of necessity and proportionality" (id: 367). In the meantime, as we have observed the continuation of these controls after the 1st of January 1993 for both EC-citizens and "third country nationals", one has begun to put these practices to the test: there are numerous anecdotes told by regular travellers about complaints which they have lodged with the national authorities.

### 3. European Police Co-operation as a Regulatory Regime

According to Krasner (1983: 2), "Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations".

Keohane (1989: 4) similarly defines regimes as "institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations", while Young (1983: 99) defines them as "negotiated orders". Keohane (1989: 5) adds that when "international regimes are negotiated on the basis of previous conventions, they typically expand and clarify the rules governing the issues concerned."; "The process by which international regimes develop is therefore a process of increasing institutionalization". The responsibility for adapting and transforming international regimes lies in the hands of international organisations and constituent states (id: 5). International regimes facilitate the reaching of substantive agreements by "providing a framework of rules, norms, principles and procedures for negotiation" (id: 110), and by providing frameworks for establishing legal liability, improve the quantity and quality of information available to actors, or reduce transaction-costs (id: 111). Haas (1989: 402) adds that "regimes may also contribute to the empowerment of new groups", in particular where it concerns "epistemic communities", which "may introduce new policy alternatives to their governments".

As these definitions do not exclusively apply to highly formalised international institutions, we can apply it to the field of European police co-operation, which is principally characterised by a large number of informal and ad-hoc arrangements.

### 3.1. Institutions of governance relevant to European police co-operation

Bulmer (1993: 7f) has drawn up an inventory of the institutional components of governance. From the above it has emerged that the policy-making field concerning European police co-operation is a rather diffuse one, due to the largely intergovernmental, and hence extra-treaty based agreements and institutional structures. The identification of the decision-making bodies is therefore, to say it in Bulmer's words (1993: 8), "less clear-cut". One could define the decision-making bodies on internal security issues as "institutional satellites", which have a number of relations with formal institutions, such as the Council of Europe - which has been very active indeed in monitoring international crime and in drawing up international conventions and guidelines, the European Commission - which is naturally involved in aspects related to police co-operation, such as the free movement of persons, customs, immigration, and the social and health aspects of drug addiction. The European Parliament has been very active indeed in monitoring developments surrounding the Schengen Agreement (Van Ouirive 1992a) and the establishment of Europol (Van Ouirive 1992b), and it has reported on developments in immigration (Tsimas 1992), xenophobia and racism (European Parliament 1991). When one looks at European police co-operation as a policy community (Den Boer 1992b), the "institutional satellites" mentioned above could also be defined as "sub-systems" (Jordan 1990: 473).

The **inter-institutional relations** between bodies like Trevi, the Schengen Secretariat, the Europol Working Group, the anti-mafia Committee, the Pompidou Group, the Ad Hoc Group on Immigration, the UCLAT, etc. with

these official bodies are of crucial importance, as they determine flows of information which can be used in the pursuance of new policy-initiatives.

The **power balance** between the bodies concerned (Bulmer 1993: 9) is indeed a factor which should be highlighted in greater detail. It is self-evident that given the rather limited competence of the European Community in the field of justice and home affairs, the influence or power of the European Commission, the European Parliament and the European Court of Justice in the governance on police co-operation is nihil. The power of the Council of Ministers is large however, as it designs the wider agenda for new-policy initiatives in this area, for which it appoints special (intergovernmental) committees who examine the details of the policy, draw up an programme of action, and prepare the ground for the implementation of new policies. In the last two decades, the Council of Ministers has been the primordial body to push for initiatives in the area of police and judicial co-operation. Its most significant action has been the insertion of co-operation on justice and home affairs into one of the two intergovernmental pillars of the Maastricht Treaty, and in particular the push for the establishment of Europol. Under the Maastricht Treaty (Article K.3, 2), the Council of Ministers may act on the initiative of one of the Member States, and may:

"adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union;

adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged; it may decide that measures implementing joint action are to be adopted by a qualified majority;

without prejudice Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements."

From these provisions it may be concluded that the predominant inter-institutional relation of the Council of Ministers is that with the respective governments and relevant ministries of the Member States. It is at this level where most of the lobbying is conducted, and where essential information is exchanged. More importantly, negotiation at this level allows the members of the Council to fit parts of the home affairs and justice puzzle in with the grander design of the future of European integration.

Earlier in this paper the likelihood of an expansion of Community competence was raised, which will potentially enlarge the relative powers of the Commission, Parliament and Court of Justice. To a certain extent these powers have already been consolidated in the Third Pillar of the Maastricht Treaty:

- the **Commission** shall be fully associated with the work on the co-operation in justice and home affairs (Article K.4, 2);
- the **Parliament** shall be informed by the Presidency and the Commission on the principal aspects of activities; the Parliament shall be consulted by the Presidency, and its views ought to be taken into duly consideration; the Parliament may ask questions of the Council or may make recommendations to it (Article K.6)
- the **Court of Justice** shall have jurisdiction to interpret the provisions of conventions on the justice and home affairs co-operation, and to rule on any disputes regarding their application (Article K.3, 2c).

The relatively powerful position of the Council of Ministers suggests there is a single institution which determines which new policies should be pursued, there is also likely to be a centralisation of power, in the sense that coordination is more systematically organised (i.e. Bulmer 1993: 10). This suggestion would be misleading however, because it fails to take into account that the Council delegates power back to intergovernmental ad-hoc committees. As the "underworld" of decision-making is rather large and opaque, it is very difficult for external observers to sketch the systematicity of **institutional procedures**. These procedures lay the basis for the frequency of meetings, reporting procedures, and the ways in which declarations of intentions and decisions are reported back to the top-organisational level. In particular Trevi and the Ad Hoc Group on Immigration have regular meetings, often a month or so before the bi-annual meeting of the European Council of Ministers, in order to prepare the agenda for the making of decisions. These meetings are in turn often prepared by working groups or sub-groups, who then relate their findings and decisions to a team of "senior officials". Other procedures relate to the creation of consensus at the home front, before these views are taken to the international platform. Research into the 'comitology' of policy-making in police co-operation should be encouraged, as this level of decision-making and policy-implementation is crucial to the dynamics of European integration.

As far as **institutional norms**, or the "values" that are rooted in institutional features (Bulmer 1993: 11) are concerned, it is again difficult to apply these to the institutions involved in policy-making on European police co-operation. Not the **institutional** norms, but the **national** norms seem to dominate this governance structure. This is again related to the fact that formal EC institutions do not play a very significant role in this policy-area. However, the exchanges and power-plays within the European Council of Ministers signify a display of national norms, or as I would prefer to call them "normative horizons" or "normative objectives". A very clear example has been Chancellor Kohl's campaign for the establishment of Europol. The objective to establish a "European FBI" was interconnected with Germany's scenario for Europe's future, which is more federalist than some other Member States would like: in other words, federalism may be the (national) norm for some, but not for all. Unfortunately it goes beyond the remit of this paper to analyse dialogical processes in which normative scenarios for European integration are confronted and fused. Apart from the normative horizons, it is also particularly important to take into account the national and/or institutional **expectations (or predictions)** for Europe's future.

### 3.2 Instruments of governance relevant to European police co-operation

Bulmer (1993: 13) notes that "the most fundamental basis of governance is by means of **treaties**", which set out the decision-making arrangements, rights and duties for individuals and the EC's policy responsibilities (id: 14). **Supranational treaties** are of crucial importance to the field of European police co-operation. Indeed, the Single European Act, and in particular Article 8A, which provides the Freedom of Movement, may be regarded as the very basis and cause of recent initiatives taken in this field. Although the SEA does not confer competence on justice and home affairs to the European Community, the abolition of border controls due to the completion of the Internal Market invariably functions as a reference point for increased cross-border policing. The SEA sets out responsibilities of the European Commission over the completion of the Internal Market, and hence over the abolition of internal border controls. So therefore, paradoxically, the legitimation and justification of new policy-initiatives in police co-operation lie in the SEA, whilst the actual planning, operationalisation, implementation and control have their basis within the intergovernmental arena.

Also **overarching political or "constituent" agreements** (Bulmer 1993: 14) are of relevance for the field of European police co-operation. Consider for example the political declaration on the establishment of a European Police Office (Europol), which has been inserted in the Final Act of the Maastricht Treaty<sup>5</sup>. But there have also been looser political declarations, such as multilateral or intra-Community declarations against terrorism. An example of an ad hoc tripartite declaration was the call for justice and the condemnation of terrorism by Britain, France and the United States on 27 November 1991 after the Pan Am 103 bombing over Lockerbie. This was followed by an intra-Community endorsement of that declaration, in which Libyan authorities were urged to "comply promptly and in full" with the demands. For the remainder, there have been numerous occasions on which the EC ministers of justice and home affairs convened and agreed on common measures against terrorism.<sup>6</sup>

The third instrument of governance is again of great relevance to police co-operation. **International laws** (Bulmer 1993: 15) include the supranational legislation coined by the United Nations and by the Council of Europe, and contains a number of other conventions concluded under different auspices. The UN Convention against illicit traffic in narcotic drugs and psychotropic substances (the 1988 *Vienna Convention*) has been a considerable breakthrough in securing international concerted action against drug trafficking. At the same time, the United Nations have proved to be an unsuitable vehicle for concerted international action against terrorism (Clutterbuck 1990: 120). In contrast, the Council of Europe Convention for the Suppression of Terrorism has been a good

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<sup>5</sup>"Declaration on Police Cooperation", Final Act, Treaty on European Union: "The Conference confirms the agreement of the Member States on the objectives underlying the German delegation's proposals at the European Council meeting in Luxembourg on 28 and 29 June 1991. (.....)"

<sup>6</sup>E.g. ;*Le Monde*, 17/9/86, "Les ministres de l'intérieur des Douze vont se concerter prochainement à Londres"; *The Times*, 4/6/88, "Action on terrorism agreed".

deal more successful. The "ECST" was adopted in 1977, and by 1989 17 of the 21 countries had ratified it. Some of its realistic force was undermined however by insertion of Article 5 and 13, which entailed that states could reserve the right to overcome the 'political offence' loophole in the light of national interest considerations (id: 123). One can therefore cautiously conclude that the more global the character of politically sensitive agreements, the more difficult it is to reach consensus or to enforce a uniform implementation of the statutes. This, in turn, makes the conclusion of agreements at the regional level of the European Community an attractive alternative, partly because the political regimes are closely related, and partly because there are mechanisms which facilitate efficient decision-making.

The **EC legislative acts** (Bulmer 1993: 15), which are included under the fourth instrument of governance, do not cover a large number of policing aspects. This is again coupled with the lack of EC competences in this area. There are five EC directives and/or regulations which are worth mentioning however, which are the EC Firearms and Ammunitions Directive<sup>7</sup>, the EC Directive on Insider Dealing<sup>8</sup>, the EC Directive on the Prevention of the Abuse of Substances for the Illicit Production of Narcotic Drugs and Psychotropic Substances<sup>9</sup>, the EC Directive on Money Laundering<sup>10</sup>, and the Draft EC Directive on Data Protection<sup>11</sup>. In the light of the lack of competence of the EC in criminal law, it is interesting to note that the Money Laundering Directive was not agreed as a measure of general criminal law, but as a means of protecting the integrity of financial institutions and markets (HM Treasury 1992). The Commission has also attempted to achieve competence with respect to immigration policy:

"As early as 1978 the Commission submitted a draft directive which was intended to adapt the legislation of the member-states which concerned the fight against illegal immigration and illegal work (). The Commission based its powers in this area upon section 100 of the EEC-

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<sup>7</sup>Frontier controls on the possession of weapons ceased to be justified after the entry into force on 1 January 1993 of Directive 91/477/EEC, which has made the acquisition and possession of weapons subject to common rules based on a Community list of authorised weapons.

<sup>8</sup>Council Directive 89/592 of 13 November 1989 Coordinating Regulations on Insider Trading, 1989 O.J. (L 334) 30.

<sup>9</sup>Council Regulation 3677/90 of 13 December 1990 laying down Measures to Discourage the Diversion of Certain Substances, 1990 O.J. (L 357) 1.

<sup>10</sup>EC Directive on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC), adopted by the Council of Economic and Finance Ministers on 10 June 1991. The EC Member States were required to bring into force the laws, regulations and administrative decisions necessary to comply with the Directive before 1 January 1993. The Directive is based on a number of earlier international initiatives, notably the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the *Vienna Convention*), the Basle Statement of Principles and the recommendations of the Financial Action Task Force on Money Laundering.

<sup>11</sup>Proposal for a Council Directive concerning the Protection of Individuals in Relation to the Processing of Personal Data, SYN 287. The Commission leaves the application of this Directive at the intergovernmental level rather open: "(...), it is essential that cooperation between the authorities is based on the same protective principles throughout the Community, including in those areas which are expressly outside the Community's terms of reference and are, therefore, dealt with at intergovernmental level." (Commission of the European Communities 1992: 20).

Treaty. Up to the present date the Council has not yet taken any decisions on this matter.()'' (Fernhout 1993: 9)

The **jurisprudence of the European Court of Justice** (Bulmer 1993: 15) is rapidly transgressing the frontiers of the Justice and Home Affairs field. The question is whether this generates any amount of precedent, and whether EC competence in the area of cross-border policing can be derived from the Court's jurisdiction. Relevant cases are:

-The *Hoffmann Case*.<sup>12</sup> The background of the case is that the Dutch legislation on aliens' right of entry and frontier supervision came to the Commission's notice following a complaint which was lodged by a German national, Mr Hoffmann, who, on 9 March 1984, en route for Antwerp, was denied entry to Netherlands territory at the Aken/Heerlen frontier post. He was questioned by Netherlands officials about the purpose of his journey, and about how much cash he had with him. After first declining to answer because he felt under no obligation, Mr Hoffmann declared that he had DM 5 in his possession. He was then denied access to the Netherlands and was ordered to return to Germany. The European Court of Justice held that Community nationals generally are to be considered as beneficiaries of one of the freedoms provided by the EC, and ruled the requirement to state the purpose and duration of the stay, and the financial means available, as not permissible under Directive 68/360 and Directive 73/148. The only pre-condition which Member States may impose on the right of such persons to enter their territory is the production of a valid identity document or passport.

-The Court also reserved the possible application of the public order, etc. exception clause under Articles 48, 56 (and 66) EEC. According to Timmermans (1993: 357), earlier case-law had already clarified the limited possibilities which these provisions grant Member States to justify border controls. Systematic border controls cannot be justified under these exception clauses; "only in individual cases satisfying the strict criteria of necessity and proportionality as developed by the Court's case-law, could special control measures at the border be accepted."<sup>13</sup>

-Furthermore, the Court has limited the acceptability under the Treaty of non-discriminatory controls on persons as generally allowed under national law and thus not limited to borders or border regions. "These controls (other than identity controls allowed under the above-mentioned Directives), when carried out at the border, will be incompatible with the principle of free movement if they are systematic and arbitrary and involve unnecessary constraints." (Timmermans 1993: 357)<sup>14</sup>

### 3.3. International Morality

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<sup>12</sup>Judgment of 30 May 1991, case 68/89 of the *European Communities v. the Kingdom of the Netherlands* (referred to in Timmermans 1993: 357)

<sup>13</sup>Judgement of 5 February 1991, case 321/87, *Commission of the European Communities v. Kingdom of Belgium* [1989] ECR 997, see also case 363/89, *Danielle Roux v. Belgian State*.

<sup>14</sup>Case 321/87, *Commission of the European Communities v. Kingdom of Belgium* [1989] ECR 1011, para 15.



The absence of norms and sanctions is typical again for the intergovernmental character of the regime on European police co-operation. The difference with the other policy-areas discussed in this panel is that police co-operation - or the agreements about it - does not enforce sanctions (although this does happen in related areas, such as the abolition of border controls; see below). One could call the aggregation of agreements a type of loose "confederation". But norms are perhaps more indirect, as there is a strong political expectation from the other EC Member States. The clues that hold various initiatives together are **trust** and **shared interest** (e.g. "if we pull our resources, we can do it better than on our own"). So, we can therefore assume a weak form of international morality. In this context, we could rehearse an imaginary debate between Rousseau and Machiavelli. The former acknowledges that international morality is definitely an issue in the area of international relations, as countries are involved in a play with rules which place the participants under a number of obligations. In a treatise on Rousseau's *oeuvre*, Williams (1992: 74) raises the point that Rousseau anticipated the difficulties within the EC:

"Those states, like Germany and France, that gladly fell within the European ideal (the 'general will') might find themselves falling victim to the less idealistic member states, like Britain, who seek the advantages of the union without wanting to pay the costs. The difficulty with such a system is that the general level of co-operation is dictated by the level of co-operation practised by the least enthusiastic partner. The effectiveness of the union is constantly in danger of being undermined by the actions of the reluctant partner."

It is perhaps rather ironic that if we apply this quote to European police co-operation, and in particular to Schengen and the interpretation of Article 8A of the SEA, it is one of those "idealistic" member states which has recently called for the retaining of police controls at borders<sup>15</sup>. The French government, which launched a rigorous media-campaign against the "lenient" Dutch drugs policy, indeed surprised her Schengen counterparts as France was one of the initiators behind this agreement. On the other hand, the French move was explained by a gesture of the newly installed conservative government to the electorate, which in recent years signalled an increasing anti-immigrant attitude; therefore, the French move can also be explained as a tougher policy on immigration control, but under the heading of different motives.

In line with Rousseau's philosophy about international relations, the states which "opt out" a Treaty should be sanctioned:

"States who break the terms of the treaty shall be regarded as outcasts and cannot be re-admitted to its terms until they have been properly punished and atoned for their errors." (Williams 1992: 76).

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<sup>15</sup>Agence Europe, 30/4/93, "Mr Lamassoure announces that, for France, total abolition of controls on persons will not be a reality for a long while yet"; *The European*, "French to keep border controls"; *The Independent* 1/5/93, "France retains border controls"

We have seen in the reaction by the European Commission to the French move<sup>16</sup> that there is indeed a strategy to condemn the state or states which do not comply with principles and agreements.

But this international morality-play would be minimised by Machiavelli if he would be Mr Bangemann's personal advisor today. Machiavelli would argue that the interest of the state prevails over the obligations of that state to other states. In other words, the trust-factor is less important than the power-factor (Williams 1992: 48, 49). This is related to Machiavelli's wider conception of international relations as an area governed by dispositions rather than by rules, in which nothing is wholly predictable (Williams 1992: 52). It is the question whether in the era of post-modern politics, it is more important to be seen to be acting in good faith rather than to actually act in good faith: to what extent are the relations of trust between the EC Member States connected with self-interest, or, are relations of trust interrupted or severed when they do not any longer assist the successful achievement of state-interests?

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<sup>16</sup>*Financial Times*, 6/5/93, "EC states risk action on passport checks": "Action will be taken against member states which resist the abolition of passport checks on people travelling within the EC, the European Commission warned (...)."

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